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RECENT CASES

CRIMINAL LAW—CONSTITUTIONAL PROHIBITION AGAINST USE OF POST-ARREST SILENCE FOR IMPEACHMENT PURPOSES. *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *Doyle v. Ohio*[1] the United States Supreme Court held[2] that a defendant's post-arrest silence following receipt of *Miranda* warnings[3] may not be used for impeachment purposes during cross-examination. Although the Court based its decision on the due process clause of the fourteenth amendment,[4] this rationale is contrary to prior pronouncements on the subject.[5] Employment of such silence as substantive evidence of guilt had previously been held prohibited by the fifth amendment,[6] but its use for impeachment had been treated on an evidentiary basis.[7] In revising its stance the Court reasoned that it would be fundamentally unfair to permit the defendant to be impeached by his silence after having been implicitly assured by the *Miranda* warnings that silence would carry no penalty.[8] The *Doyle* holding thus buttresses the eroding protective rampart furnished by *Miranda v. Arizona*.[9]

Defendants Doyle and Wood had arranged, according to state's evidence, to sell ten pounds of marijuana to a police informant. After the transaction was completed, the defendants discovered that they had been paid less than the agreed price. While attempting to relocate the informant and the remaining cash, defendants were intercepted by the police, arrested, and given *Miranda* warnings. During separate trials both defendants contended that they had been framed and that they, in fact, were the ones buying from the informant. On cross-examination the prosecutor

1. 426 U.S. 610 (1976).
2. Justice Powell delivered the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, Stewart, White and Marshall. Justice Stevens filed a dissenting opinion in which Justices Blackmun and Rehnquist joined.
3. Miranda v. Arizona, 384 U.S. 436 (1966). Prior to custodial interrogation the individual must be warned that he has a right to remain silent, that he has the right to presence of counsel during interrogation and appointed counsel if he is indigent, and that any statements made may subsequently be used against him. *Id.* at 478-79.
4. U.S. CONST. amend. XIV.
5. *See* United States v. Hale, 422 U.S. 171 (1975).
6. Griffin v. California, 380 U.S. 609 (1965). *Griffin* dealt with prior silence at trial, but the distinction between post-arrest silence and trial silence in the context of implying guilt is slight. Courts considering the issue have so held. *See, e.g.*, United States v. Fairchild, 505 F.2d 1378, 1383 (5th Cir. 1975); United States v. Nolan, 416 F.2d 588, 594 (10th Cir.), *cert. denied*, 396 U.S. 912 (1969).
7. United States v. Hale, 422 U.S. 171 (1975).
8. Doyle v. Ohio, 426 U.S. 610, 617 (1976).
9. 384 U.S. 436 (1966).

asked them why they had not previously related this exculpatory story to the arresting officers. Respective defense counsel objected to this question, but in both cases were overruled.[10]

Following conviction, each defendant appealed to the county court of appeals alleging, *inter alia*, that the prosecutor's references to the accused's post-arrest silence infringed upon his constitutional rights.[11] The court of appeals affirmed on the ground that the evidence was used solely to impeach, not as substantive evidence of guilt. The Supreme Court of Ohio denied further review and the United States Supreme Court granted certiorari specifically to rule on the constitutionality of utilizing post-arrest silence for impeachment purposes.[12]

At common law, a defendant's pre-trial silence was generally admissible to impeach his testimony at trial[13] provided there existed a true inconsistency between the prior silence and his subsequent testimony.[14] One year before *Doyle* the Supreme Court considered this principle in relation to post-arrest silence in *United States v. Hale*.[15] There, in a substantially similar procedural setting,[16] the Court coupled an evidentiary analysis with the tenets of *Grunewald v. United States*,[17] holding that post-arrest silence, even absent *Miranda* warnings, was likely to be ambiguous and rarely capable of establishing the requisite degree of inconsistency.[18] The *Hale* decision failed, however, to reach the constitutional issue.[19] *Doyle* briefly nodded toward this evidentiary base when it

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10. 426 U.S. 610, 611-14. Doyle's exchange with the prosecutor was as follows:
Q: [Y]ou said in a response to a question of Mr. Beamer [the arresting officer]—'I don't know what you are talking about.'
A: I believe what I said,—'What's this all about?' If I remember, that's the only thing I said.
The response of Wood was similar. *Id.* at 615 n.5.

11. Defendants claimed two other errors of constitutional dimensions. First, each was cross-examined concerning his silence at pre-trial proceedings. Second, each was questioned concerning his post-arrest silence while testifying as a defense witness at the other's trial. In light of its opinion, the Court failed to reach these issues. *Id.* at 616 n.6.

12. *Id.* at 616.

13. 3A J. WIGMORE, EVIDENCE § 1042 (Chadbourn rev. ed. 1970).

14. *Id.* § 1040. To determine inconsistency the following question was posed: "[W]ould it have been natural for the person to make the assertion in question?" *Id.* § 1042, at 1058.

15. 422 U.S. 171 (1975).

16. After arrest Hale was read *Miranda* warnings. He refused to explain to the arresting officers his possession of 158 dollars, but offered an exculpatory statement at trial. On cross-examination the prosecutor questioned him regarding his previous silence. The trial court instructed the jury to disregard the remark but refused to declare a mistrial. The court of appeals reversed. *Id.* at 173-74.

17. 353 U.S. 391 (1957). In *Grunewald* the defendant responded to certain questions in a manner consistent with innocence. On cross-examination the prosecutor elicited the information that the defendant had invoked his fifth amendment privilege when confronted with the identical questions during a grand jury hearing. Based on an evidentiary analysis his conviction was reversed by the Court. In the decision the Court articulated three broad factors militating against the silence-as-inconsistency concept: repeated assertions of innocence; the secretive nature of the grand jury tribunal; and the focus on the subject as a potential defendant. *Id.* at 422-24.

18. United States v. Hale, 422 U.S. 171, 180 (1975). Application of the *Grunewald* three factor test (*see* note 17 *supra*) to post-arrest silence creates an "even stronger [case] for exclusion." *Id.* at 179.

19. The asserted purpose of the *Hale* decision was to resolve a conflict in the federal courts of appeal on the subject. *Compare* United States v. Anderson, 498 F.2d 1038 (D.C. Cir. 1974), *aff'd sub nom.* United States v. Hale, 422 U.S. 171 (1975); United States v. Semensohn 421 F.2d 1206 (2nd Cir. 1970) (evidence of post-arrest silence not admissible for impeach-

noted that "*every* post-arrest silence is *insolubly* ambiguous because of what the State is required to advise the person arrested."[20]

Although the Court's due process argument seemed novel, it had been presaged by Justice White's concurring opinion in *Hale*, from which the *Doyle* Court quoted extensively:

> [W]hen a person under arrest is informed, as *Miranda* requires . . . it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.[21]

Hale had not been informed that his silence might be used against him, and since Justice White determined that "anyone" would interpret the *Miranda* warnings to preclude the use of silence, the procedure was fundamentally unfair.[22]

Fundamental fairness is essential to the concept of justice; failure to accord it to a criminal defendant constitutes a denial of due process.[23] Thus, if the state through its agents—police officers in this case—informs a suspect that anything he *says* may be used against him, while he has a *right* to remain silent, the accused would seem to have been actively misled if such silence is employed for impeachment purposes at trial. The majority in *Doyle* found support for this conclusion in *Johnson v. United States*.[24] In *Johnson*, the trial judge allowed defendant to assert his fifth amendment privilege against self-incrimination during cross-examination. On appeal following conviction the Court assumed that it would not have been error, given the peculiar circumstances, to refuse granting the right to silence.[25] Nevertheless, the Court unanimously concluded that the privilege, once accorded, made comment on the defendant's silence erroneous, citing the

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ment), *with* Agnellino v. New Jersey, 493 F.2d 714 (3rd Cir. 1974); United States v. Ramirez, 441 F.2d 950 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971) (evidence of post-arrest silence admissible for impeachment).

The divergence was not confined to the federal courts. *Compare*, *e.g.*, People v. Bobo, 390 Mich. 355, 212 N.W.2d 190 (1973) (evidence of post-arrest silence not admissible for impeachment), *with* State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968), *cert. denied*, 394 U.S. 908 (1969) (evidence of post-arrest silence admissible for impeachment).

The *Hale* decision was an exercise by the Supreme Court of its supervisory power over the federal courts. It was merely suggestive for state courts. *See, e.g.*, State v. Moore, 112 Ariz. 271, 540 P.2d 1252 (1975); Shy v. State, 234 Ga. 816, 218 S.E.2d 599 (1975). Federal courts noted that the evidentiary base of *Hale* permitted results contrary to the Court's intended conclusion. *See, e.g.*, United States v. Impson, 531 F.2d 274 (5th Cir. 1976). The decision was patently deficient. For a full discussion of *Hale* see Comment, *Impeachment of a Criminal Defendant by Evidence of Post-Arrest Silence: A Conflict Partially Resolved*, 61 IOWA L. REV. 641 (1975).

20. 426 U.S. at 617 (emphasis added). Although the Court cited *Hale*, this is an extension of the previous opinion since the writers of *Hale* had merely considered silence *likely* to be ambiguous given the particular circumstances of the arrest. United States v. Hale, 422 U.S. 171, 180 (1975).

21. 422 U.S. at 182-83 (concurring opinion).

22. *Id.*

23. Lisenba v. California, 314 U.S. 219, 236 (1941).

24. 318 U.S. 189 (1943).

25. *Id.* at 196.

"elementary fairness" to the defendant of not misleading him on the point.[26]

Dissenting from the Court in *Doyle*, however, Justice Stevens believed that no misleading is possible in situations resembling *Doyle* if the suspect did not specifically rely on the *Miranda* warnings in electing to remain silent. He contended that Doyle and Wood neither indicated their reliance on the officer's warnings in refusing information nor stood totally mute.[27] Further, their explanatory remarks at trial indicated confusion rather than a consideration of the *Miranda* warnings as the cause of silence.[28] Hence, the dissent saw no reason to invoke a due process rationale.

The validity of this reasoning is dubious. Assuming a suspect remains silent but does not state clearly that he is doing so in reliance on the *Miranda* warnings, the sole method of determining the basis for his action is to inquire as to the motive for his silence on cross-examination. It is, however, precisely at this point that the majority perceives the fundamental unfairness to attach.[29] Regardless of the defendant's response concerning his silence he loses credibility in the eyes of the jury. If his explanation is not grounded on an understanding of the *Miranda* warnings then he might, according to Justice Stevens, be impeached by the inconsistent silence.[30] But even if the testimony does reflect a conscious invocation of the fifth amendment privilege, the Court has previously recognized that such an account is unlikely to override the strong negative inference probably drawn by the jury regarding the post-arrest silence.[31] Thus, as the Fifth Circuit has noted, "We would be naive if we failed to recognize that most laymen view an assertion of the fifth amendment privilege as a badge of guilt."[32] A "penalty" is therefore incurred by the possible assertion of a constitutional right.[33] Due process, however, requires that no such penalty

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26. *Id.* at 196-97. *Doyle* is distinguishable, however. *Johnson* dealt with an explicit assurance that certain actions would not subsequently be used against the defendant, while the *Miranda* warnings contain an arguably implied assurance. Raley v. Ohio, 360 U.S. 423 (1959), is therefore more in point. In *Raley*, three defendants relied on the explicit stipulation of the chairman of a state investigatory committee that the fifth amendment privilege was available to them. One defendant was also implicitly assured, by the chairman's actions, of the propriety of her fifth amendment invocation. *Id.* at 437. They were nevertheless convicted for refusing to answer questions presented to them when it was subsequently discovered that a particular Ohio immunity statute was inapplicable. The Court reversed the convictions on the theory that misleading dictates of the state are constitutionally infirm. *Id.* at 438. *Accord*, Cox v. Louisiana, 379 U.S. 559, 571 (1965). A federal court of appeals has termed this type of misleading "quasi-entrapment." United States v. Lansing, 424 F.2d 225, 226 (9th Cir. 1970).

27. 426 U.S. at 622 (dissenting opinion). The majority evidently considered the defendants' random remarks tantamount to silence. This would appear reasonable. *See* Commonwealth v. Greco, 227 Pa. Super. 19, 22-23, 323 A.2d 132, 134 (1974) (casual conversation with arresting officers held not a waiver of fifth amendment rights). It would be unrealistic to afford a suspect only two methods of invoking his fifth amendment privilege, *i.e.*, absolute silence or a detailed articulation of his reliance on the *Miranda* warnings in refusing to respond.

28. 426 U.S. at 622.

29. *Id.* at 619 n.10.

30. *Id.* at 624-26 (dissenting opinion).

31. United States v. Hale, 422 U.S. 171, 180 (1975).

32. Walker v. United States, 404 F.2d 900, 903 (5th Cir. 1968).

33. This concept of penalty is derived from Griffin v. California, 380 U.S. 609 (1965), in

attach. Due process is not geared toward ascertainment of truth, but rather toward ensuring fundamental fairness.[34] In order to prevent such a penalty situation from arising, the Court deemed it necessary to prohibit *any* line of questioning dealing with a post-arrest silence that may involve the exercise of a fifth amendment privilege.[35]

The "penalty" in *Doyle*-type situations may be viewed as attaching at either of two points. First, it may attach at the time of arrest, at which point the defendant's decision whether to respond to questioning is fettered by the knowledge that if he elects not to respond he may be forced to perpetuate his silence for fear of subsequent impeachment.[36] Second, if he does remain silent he is penalized when he takes the stand and the prosecutor is allowed to draw negative inferences from the "inconsistency" between his prior silence and his testimony at trial.[37]

While a burden, or penalty, is apparent, not every burden upon the exercise of a constitutional right is necessarily infirm.[38] The present position of the Court holds that if there is a legitimate state interest in a procedure it will be upheld even though it burdens, as an "incidental consequence," the invocation of a constitutional right.[39] The salient inquiry, therefore, is whether the use of post-arrest silence to impeach a defendant's trial testimony advances such an interest.[40] Undeniably, the state has an interest in impeaching the testimony of a defendant,[41] and the

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which the Court found a constitutional violation when a state prosecutor attempted to imply guilt on the basis of defendant's failure to give certain testimony. *Id.* at 615. The Court reasoned that to allow such comment would have burdened defendant in that the prosecutor could urge guilt from the assertion of the privilege regardless of whether defendant took the stand. The penalty in *Doyle*, however, is different and arguably of a lesser degree. For a more complete articulation of the penalty concept vis-a-vis impeachment by post-arrest silence see Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence*, 123 U. PA. L. REV. 940, 954-73 (1975).

34. Lisenba v. California, 314 U.S. 219, 236 (1941). This is evident from the numerous coerced confession cases. Independent corroborative evidence often demonstrated the truthfulness of the confession. The paramount concern of community fair play, however, demanded that the confessions not be admitted. Rogers v. Richmond, 365 U.S. 534, 541 (1961).

35. Doyle v. Ohio, 426 U.S. 610, 619 (1976). Despite this holding, post-arrest silence may be used for impeachment if the defendant has testified that he actively cooperated with the police at the time of arrest. In this case the silence is not used to impeach an exculpatory statement but to contradict the defendant's behavior. *Id.* n.11.

Unfortunately, the Court failed to explicate the principles implicit in such a penalty rationale, principles that were assailed by Justice Stevens in dissent. Justice Stevens noted that the penalty argument rests heavily on mere dictum articulated in Miranda v. Arizona, 384 U.S. 436 (1966):

> In accord with our decision today, it is impermissible to *penalize* an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

Id. at 468 n.37 (emphasis added).

36. *See also* Agnellino v. New Jersey, 493 F.2d 714, 723-25 (3rd Cir. 1974).

37. Johnson v. Patterson, 475 F.2d 1066, 1067-68 (10th Cir.), *cert. denied*, 414 U.S. 878 (1973).

38. McGautha v. California, 402 U.S. 183, 215-17 (1971). Allowable penalties include permitting impeachment by proof of prior convictions, requiring a notice from the defendant of his alibi defense prior to trial, and refusing the fifth amendment privilege to defendants being cross-examined concerning matters testified to on direct examination. *Id.*

39. Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973).

40. To satisfy such a test the state must have a legitimate interest in impeaching a defendant and in advancing the truth seeking process by introduction of post-arrest silence.

41. *See* 3A J. WIGMORE, EVIDENCE § 874 (Chadbourn rev. ed. 1970).

Doyle majority specifically notes that wide leeway must be given to the prosecutor during cross-examination.[42] It is necessary to the truth-seeking process that all pertinent information be considered.[43]

Justice Stevens contended in his dissent that *Harris v. New York*[44] mandated the proposition that the state has a paramount interest in this truth seeking process. *Harris* had held that statements elicited from a suspect following a defective recitation of the *Miranda* warnings could be used for impeachment, but not as substantive evidence of guilt, so long as the prior statement was trustworthy and sharply contrasting with the proffered testimony.[45] The essential concept in *Harris*, however, is *inconsistency*, and in the case of silence this condition is simply not fulfilled. Thus, the opinions construing silence as inconsistent with a subsequent exculpatory statement have invoked diverse and vague standards to determine inconsistency—deciding the matter almost *a priori*.[46] When a statement is contrasted with a subsequent statement some tangible standard is possible, but as the Court recognized in *United States v. Hale*,[47] this standard breaks down with silence in an arrest situation absent *Miranda* warnings.[48] Even with *Miranda* warnings, however, the silence becomes "insolubly ambiguous" unless it is probed on cross-examination, a procedure previously noted to be infirm.[49]

Conceding a state's legitimate interest in impeaching a defendant's testimony at trial, the *Doyle* majority nevertheless holds that impeachment of that testimony by use of post-arrest silence following receipt of *Miranda* warnings does not advance that interest. This is so because silence under these circumstances is insolubly ambiguous: it does not assist in the truth seeking process. Thus the employment of silence for impeachment purposes burdens the exercise of fifth amendment rights with an unconstitutional penalty.[50]

The *Doyle* decision dictates uniformity in state and federal courts. Prosecutors are now constitutionally prohibited from introducing evidence of post-arrest silence following *Miranda* warnings to impeach a subsequent exculpatory story.[51] The Court's due process rationale[52] was correct

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42. 426 U.S. at 617 n.7.
43. United States v. Nixon, 418 U.S. 683, 709 (1974).
44. 401 U.S. 222 (1971). Justice Stevens also cited Raffel v. United States, 271 U.S. 494 (1926), as supportive of his rationale, but conceded that *Raffel* was all but overruled by Grunewald v. United States, 353 U.S. 391 (1957), and Johnson v. United States, 318 U.S. 189 (1943).
45. Harris v. New York, 401 U.S. 222, 224 (1971). The Court spoke in terms of *Miranda* not being "perverted into a license to use perjury by way of a defense." *Id.* at 226. *See also* Oregon v. Hass, 420 U.S. 714 (1975); Walder v. United States, 347 U.S. 62 (1954).
46. *See, e.g.*, United States v. Ramirez, 441 F.2d 950, 954 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971).
47. 422 U.S. 171 (1975).
48. *Id.* at 179-80.
49. *See* notes 29-35 and accompanying text *supra*. As a Fifth Circuit decision upholding the *Harris* exception in the case of silence noted, the prior silence must be "much more than ambiguous." United States v. Fairchild, 505 F.2d 1378, 1382 (5th Cir. 1975).
50. *See also* Fowle v. United States, 410 F.2d 48, 53 (9th Cir. 1969).
51. In the event that such evidence is introduced the state must demonstrate on appeal that its use was harmless, based on the strict standards of constitutional error. The state in

and ensures that the *Miranda* warnings have not become merely an "armor of gauze."[53] It remains, however, for the Court to more fully articulate the constitutional implications of the decision.

LEGAL ETHICS—CONTINGENT FEES TO EXPERT WITNESSES—IS DISCIPLINARY RULE 7-109(C) DEAD? *Person v. Association of the Bar of City of New York*, 414 F. Supp. 144 (E.D.N.Y. 1976).

In *Person v. Association of the Bar*,[1] a portion[2] of Disciplinary Rule 7-109(C)[3] of the American Bar Association's Code of Professional Responsibility was declared unconstitutional. That portion of the rule prohibits a lawyer from paying—or acquiescing in the payment of—compensation to a witness contingent on the outcome of the case. In declaring this prohibition unconstitutional, *Person* rejects the idea that an expert witness' compensation becomes improper merely because it is contingent upon the employing party's success in court. In this respect,

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Doyle did not advance this theory. Normally, a constitutional error is harmless if there is no reasonable possibility that the evidence in question contributed to the conviction. Chapman v. California, 386 U.S. 18, 23 (1967). Justice Stevens perceived error in the prosecutor's use of Doyle's silence to imply guilt in his closing argument. He concluded, however, that in the context of the entire trial the error was harmless. 426 U.S. at 636 (dissenting opinion).

52. Few lower courts had previously considered the issues of due process and fundamental fairness in the context of impeachment by post-arrest silence. Further, those courts that employed the argument generally did so as supportive of their primary analysis based upon either fifth amendment rights or the lack of probative value of the evidence. *See, e.g.*, United States v. Anderson, 498 F.2d 1038, 1044 (D.C. Cir. 1974), *aff'd sub nom.* United States v. Hale, 422 U.S. 171 (1975); State v. Griffin, 120 N.J. Super. 13, 17, 293 A.2d 217, 219 (1972).

53. Burko v. State, 19 Md. App. 645, 651, 313 A.2d 864, 868 (1974).

[Casenote by Stanley Yorsz.]

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1. 414 F. Supp. 144 (E.D.N.Y.1976). The case was part of Person's three-pronged attack on the ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as ABA CODE]. *See* Person v. Ass'n of the Bar, 414 F. Supp. 133 (E.D.N.Y. 1976), in which Person challenged the Code's prohibition against advertising a legal specialty and hourly rate. *See also* Person v. Ass'n of the Bar, 414 F. Supp. 139 (E.D.N.Y. 1976).

The ABA Code has been adopted in at least 33 states; in others the ABA Canons of Professional Ethics are in effect. *See* Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. C.R.-C.L. L. REV. 77, 78 n.8 (1973). For a general review, see Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255 (1970).

2. Constitutional infirmity of a part of a statute need not result in failure of the statute as a whole; by analogy, only the invalid portion of a rule of court need be stricken. On the criteria for statutory severability, see 2 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 44.01-.20 (1973).

3. ABA CODE, *supra* note 1, Disciplinary Rule 7-109(C) states:

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> 1. Expenses reasonably incurred by a witness in attending or testifying.
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then, *Person* rejects an idea nearly universally accepted in the case law,[4] in court rules,[5] and in the commentaries.[6]

The plaintiff, an attorney in an antitrust case, maintained that because of his client's inability to pay expert witness fees and the prohibition of the disciplinary rule, he was unable to obtain the services and testimony of economists and accountants needed for his case. The plaintiff showed further that in his type of practice, this predicament is a recurring one. He therefore moved for summary declaratory judgment that the rule was invalid.[7] The district court granted the motion. Insofar as the rule "'must particularly forbid to the less affluent and to the indigent a means of obtaining an equal hearing" it was held too irrational to survive fourteenth amendment analysis.[8]

Disciplinary Rule 7-109(C) transforms a principle of the common law into a rule of court for the discipline of lawyers. The common law condemns any contract between a lawyer and an expert,[9] or a litigant and an expert, in which the expert's compensation is contingent upon the outcome of the case[10] or a percentage of the recovery.[11] Such an agreement is said to

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4. *See, e.g.*, Thomas v. Caulkett, 57 Mich. 392, 24 N.W. 154 (1885); Hough v. State, 145 App. Div. 718, 130 N.Y.S. 407 (1911); Griffith v. Harris, 17 Wis. 2d 255, 116 N.W.2d 133 (1962), *cert. denied*, 373 U.S. 927 (1963). *See also* cases cited, notes 10, 11 *infra*.

5. PA. R. CIV. P. 204 also deals with the specific problem of the lawyer-expert contract. It states:

> No attorney shall promise to pay or shall, directly or indirectly, make payment or sanction the payment of any compensation . . . to any person in recognition of his services or connection with any case in addition to the compensation agreed upon or customarily and reasonably charged for services actually rendered by such person. The amount of such compensation shall not depend on or be determined, directly or indirectly, by the outcome of the case.

As PA. R. CIV. P. 204 is broad enough to include lay investigators and experts who help prepare the case but do not actually testify, it has a wider scope than Disciplinary Rule 7-109(C), which applies only to paid witnesses. 1 GOODRICH-AMRAM, PA. PROCEDURAL RULES SERVICE WITH FORMS § 204-1, at 14 n.16 (1967), states, "Preliminary drafts of Rule 204 applied to payments to 'any physician, medical practitioner or expert witness.' As promulgated by the supreme court, Rule 204 applies to payments to 'any person.'" Thus, the Supreme Court of Pennsylvania has clearly enunciated its aversion to contingent fee payment to anyone with the responsibility to produce evidence.

6. 6A A. CORBIN, CONTRACTS § 1430 at 379 (1962); RESTATEMENT OF CONTRACTS § 552(2) (1945); 14 S. WILLISTON, WILLISTON ON CONTRACTS § 1716, at 879 (3d ed. 1972); BOMAR, THE COMPENSATION OF EXPERT WITNESSES, 2 LAW & CONTEMP. PROBLEMS 510, 520 (1935).

7. "The most commonly used direct remedies for achieving relief from invalid legislation are declaratory judgments and injunctions against enforcement." 1 C. SANDS, *supra* note 2, § 2.05. Person had attempted to obtain an injunction against Disciplinary Rule 7-109(C) in Person v. Ass'n of the Bar, 414 F. Supp. 139 (E.D.N.Y. 1976s, but it was ruled that a declaratory judgment was the more appropriate remedy.

8. 414 F. Supp at 146. It is not clear what fourteenth amendment analysis was used to support this decision. The court appears to mingle elements of equal protection and of substantive and procedural due process when it states,

> [It] is concluded that to treat contingency of payment as in and of itself improper is too irrational to survive Fourteenth Amendment analysis. The interest in access to the courts on a basis of equality may not exact redress of every imbalance that disparity of means can produce, but it is of such fundamental importance that it cannot be subjected to a constraint that is not adapted to effective achievement of its professed goal.

Id. Cf. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970).

9. On the validity of expert witness contracts generally, see 31 AM. JUR. 2d *Expert & Opinion Evidence* § 10 (1967); Annot., 16 A.L.R. 1457 (1922).

10. *In re* Certain Lands in City of New York, 144 App. Div. 107, 128 N.Y.S. 999 (1911), *aff'd*, 204 N.Y. 625, 97 N.E. 1103 (1912); Pollak v. Gregory, 9 Bos. 116 (N.Y. Super. Ct. 1861); RESTATEMENT OF CONTRACTS § 552(2) (1945).

11. Sherman v. Burton, 165 Mich. 293, 130 N.W. 667 (1911); Laffin v. Billington, 86 N.Y.S. 267 (App. Term 1904).

violate public policy as it "smack[s] of champerty and induces perjured testimony." [12]

Champerty, however, can be distinguished from a contingent fee contract with a witness. Champerty is the investment of money in a lawsuit, whereas in a contingent fee arrangement only services are invested. For example, in a recent Pennsylvania case, *Belfonte v. Miller*,[13] it was held that a contract by which a realtor was to receive a percentage of the damages in an eminent domain proceeding in exchange for his research and testimony was not champertous. It was nonetheless voided because the contingent fee violated public policy against practices that might foster perjured testimony and thereby interfere with the sound administration of justice.

Both the common-law rule against contingent fee contracts with expert witnesses and Disciplinary Rule 7-109(C) are designed to achieve a policy goal of unperjured or unbiased testimony. Nevertheless, as noted in *Person*,

> [i]t must be doubted that there is total compliance with the Rule in its present form. The case in which the unsuccessful personal injury plaintiff's lawyer goes unpaid must not infrequently be also the case in which the expert medical witness does not press either the plaintiff or his lawyer for payment.[14]

This being the case, the rule is subject to attack from a constitutional standpoint as well as from the standpoint of the case law.

The reality to which *Person* makes indirect reference is that litigants seek the best witness, not the best scientist. Unless the expert can support the litigant's position, he will not be called upon to testify.

> At one extreme, this has led to the practice of the corrupt 'medical expert' who is prepared to use the labels and language of expertise as a means of deceiving the trier of fact. Less extreme is the partisan expert. Under ordinary adversary procedure, the expert employed by a party with the knowledge that he will be paid by him is more likely to develop a bias . . . and emphasize deductions and inferences in a way that furthers his party's case.[15]

So it is that expert witnesses have been called "hired champions,"[16] "intellectual soldiers of fortune,"[17] and "a kind of intellectual prostitute."[18] The enormous fee commanded by an expert has been regarded as the equivalent of a bribe.[19] The resulting "battle of the experts" has

12. Bomar, *The Compensation of Expert Witness*, 2 LAW & CONTEMP. PROBL. 510, 520 (1935).
13. 212 Pa. Super. Ct. 508, 243 A.2d 150 (1968).
14. 414 F. Supp. at 146.
15. Van Dusen, *A United States District Judge's View of the Impartial Medical Expert System*, 32 F.R.D. 498, 500 (1963).
16. Molinari, *The Role of the Expert Witness*, 9 FORUM 789, 791 (1974).
17. Westenhauser, *The Expert Witness*, 67 ALBANY L.J. 2, 7 (1905).
18. Friedman, *Expert Testimony, Its Abuse and Reformation*, 19 YALE L.J. 247, 247 (1910).
19. Rice, *The Medical Expert as Witness*, 10 GREEN BAG 464, 466 (1898).

increased dissatisfaction and led to proposals for change in the entire manner of using expert testimony in civil litigation. The essence of these proposals is the use of court-appointed experts.[20]

From a constitutional standpoint the court found that if the rule against contingent fee contracts with expert witnesses has ever removed an incentive to untruthful testimony, it has done so "at too great a cost in fundamental fairness."[21] What the rule does accomplish is to keep the less affluent and indigent individual out of court: he may find an attorney to take his case on a contingent fee basis, "[b]ut he may not obtain any expert whom the merits of his case can attract to study it and testify to his opinion."[22] Thus, the case "falls in the area considered in *Boddie v. Connecticut.*"[23] Under the *Boddie* standards, the rule could not withstand fourteenth amendment attack. It follows, therefore, that if the disciplinary rule keeps the less affluent out of court, so does the common-law rule on expert witness contracts; it must also fall under fourteenth amendment attack.

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20. FED. R. EVID. 706 provides that the court may appoint a neutral expert, either on the motion of a party or on the motion of the judge. It also provides that compensation will be paid to the expert out of government funds or by the parties in proportions directed by the judge. While FED. R. EVID. 706 preserves the right of parties to call their own experts, it does not help a party, who, as in the *Person* case, cannot afford to retain the services and/or testimony of an expert for his own use.

The use of court-appointed experts is the essence of other proposals and codifications that seek to minimize the abuses of expert advocacy. Wigmore suggested that a jury of experts be used. *See* 2 J. WIGMORE, WIGMORE ON EVIDENCE § 563, at 647-48 (3d ed. 1940). Learned Hand approved this proposal and traced the use of the expert jury back to the fourteenth century. *See* Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40-41 (1901).

The first modern codification of impartial expert procedure in civil trials appeared with the Uniform Expert Testimony Act, approved in 1937 by the Commissioners on Uniform State Laws, and found at 9A U.L.A. 536 (1965). It was approved only in South Dakota; *see* S.D. CODE §§ 36.0109-.0118 (2 Supp. 1960). MODEL CODE OF EVIDENCE rules 403-410 (1942), not adopted in any state, correspond closely to the provisions of the Uniform Expert Testimony Act.

The court-appointed expert system is not without critics. One concern is that the court-appointed critic acquires an aura of infallibility, to which he is not entitled. *See* Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416 (1961).

It is generally agreed that any judge, in state or federal court, has inherent power to call expert witnesses on his motion without the need of an enabling statute. *See* 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2484, at 267-70 (3d ed. 1940); Note, *The Trial Judge's Use of His Power to Call Witnesses*, 51 NW. U.L. REV. 761 (1957); Note, *Judicial Authority to Call Expert Witnesses*, 12 RUTGERS L. REV. 375 (1957); Annot., 95 A.L.R.2d 390 (1964).

21. Person v. Ass'n of the Bar, 414 F. Supp. 144, 146 (E.D. N.Y. 1976).

22. *Id.*

23. *Id.* at 145. The court reasons in *Person* that two kinds of interests are affected by Disciplinary Rule 7-109(C): the lawyer's and the client's. The lawyer has an interest in being able to pursue his client's case freely, and the client has an interest in having his case heard. Since the second interest depends upon the first, it is more drastically affected by the rule.

Boddie v. Connecticut, 401 U.S. 371 (1971), required the state to develop a procedure whereby indigent plaintiffs could commence a divorce action without having to pay the fees, and costs. The Court said it was a denial of due process to impose fees that effectively denied the poor access to the courts. At one time it was thought that *Boddie* foreshadowed a general right of access to the courts for indigents. The Court's decisions in Ortwein v. Schwab, 410 U.S. 656 (1973), and United States v. Kras, 409 U.S. 434 (1973), ended such speculation as they showed that *Boddie* was to be applied only in limited situations. Nevertheless, the question of access is still open. *See* Comment, *The Heirs of Boddie: Court Access for Indigents After Kras and Ortwein* 8 HARV. C.R.-C.L. L. REV. 571 (1973).

Person can be distinguished from *Boddie*, however. First, *Person*, which prohibits state action, effects increased access to the courts by a different means than *Boddie*, which requires state action. *Person* deals with the freedom to contract. Second, *Person* affects the rights of a broader class of people, as it includes the "less affluent and indigent." 414 F. Supp. at 146. *Boddie* is limited to the indigent.

This conclusion is supported by the fact that discussion in *Person* focuses on the reasoning used in the common law. *Person* cites *Barnes v. Boatmen's National Bank of St. Louis*,[24] for example, as one of the few cases to uphold the conclusion that a contingent fee payment is not in and of itself improper.[25] In *Barnes*, the court affirmed the right of a psychiatrist to collect his contingent fee for services and testimony rendered as an expert. They noted:

> [There is nothing] in the evidence tending to show that the respondent's testimony and advice was [sic] not his honest opinion. . . . [W]e are not at liberty to draw the inference that respondent's testimony was false because his fee was contingent upon the success of the litigation. If we did so, we would be compelled to infer that a party litigant's testimony was false because he is interested in the outcome of his litigation. We would also have to infer that all witnesses were guilty of perjury who were produced by an attorney trying a case on a contingent fee basis.[26]

There are other cases, however, indirectly supporting *Person*, that uphold contingent fee compensation in a contract with an expert or investigator employed only to produce evidence for litigation, but not to testify.[27] In this kind of contract the temptation to produce fabricated evidence or to suppress damaging evidence does not render a contract invalid; rather, it takes an invalid provision, such as a promise to produce evidence of a certain content, to do so.[28] There is no logical reason, therefore, to apply a special prohibition to the employee expert who contracts to produce evidence and also to testify. In both types of contracts there is a temptation to falsify evidence, be it testimonial or documentary.

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24. 248 Mo. 1032, 156 S.W.2d 597 (1941). *Barnes* is cited in a case ancillary to that discussed in this note. Person v. Ass'n of the Bar, 414 F. Supp. 139, 143 (E.D.N.Y. 1976).

25. *Cf.* language in Ferroline Corp. v. General Aniline & Film Corp., 107 F. Supp. 326, 344 (N.D. Ill. 1952), *aff'd*, 207 F. 2d 912, 916 (7th Cir. 1953).

26. Barnes v. Boatmen's Nat'l Bank, 248 Mo. 1032, 1038, 156 S.W.2d 597, 602 (1911). *Barnes* emphasizes that the parties who contracted on a contingent fee basis were not guilty of misconduct. Nevertheless, in Belfonte v. Miller, 212 Pa. Super. Ct. 508, 243 A.2d 150 (1968), the court voided the contract even though it noted that the parties had behaved in an exemplary fashion.

27. Haley v. Hollenback, 53 Mont. 494, 165 P. 459 (1917); Singer Mfg. Co. v. City Nat'l Bank, 145 N.C. 319, 59 S.E. 72 (1907); Miller v. Anderson, 183 Wis. 163, 196 N.W. 869 (1924).

28. *See* Griffith v. Harris, 17 Wis. 2d 255, 116 N.W. 2d 133 (1962), in which plaintiff sued defendant for damages for breach of his promise to appear in court and give testimony favorable to plaintiff. The contract was void as against public policy. The *Person* court accepts the proposition that one cannot bargain for testimony of a certain content, and to the extent excessive fees will affect the content of the testimony, they should be limited. Thus, the court stated that expert witness fees should be kept reasonable in amount, defined as "an amount related to time spent, difficulty of the problem, inconvenience imposed . . . and such factors . . . ." 414 F. Supp. at 146.

Courts rarely regulate fees paid to witnesses. *See, e.g.*, Cold Metal Process Co. v. United Eng'r & Foundry Co., 83 F. Supp. 914 (W.D. Pa. 1938), wherein it was held that a litigant may properly pay "substantial sums" for expert testimony. *See also* Dureff's Estate, 64 Pa. D & C.2d 650 (C.P. Phila. 1973) (finding payment of over $1000 proper).

Person passes judgment on whether a reasonable fee is made unreasonable if it is not paid in all circumstances. The court notes, "It is not meant to suggest that in the case of the expert a fee measured as a percentage of the recovery might not generally or in particular cases be regarded as *per se* unreasonable." 414 F. Supp. at 146. An unreported case, Pluvinage v. Cummings, CA No. 2264-71 (D.D.C. order of Oct. 21, 1974) (Corcoran, J.), held that a medical—legal corporation was permitted to receive a percentage in a malpractice suit as long as the percentage requested was reasonable. The percentage requested in the contract was ten percent of the ultimate verdict.

If the temptation to falsify evidence is insufficient to invalidate one category of contracts, it should be insufficient as to the other.

While the precise issue in *Person* is Disciplinary Rule 7-109(C), it seems clear that the decision, if followed elsewhere, will do more than simply free lawyers from the threat of disbarment.[29] The decision would also require courts to honor and enforce contingent fee agreements between litigants and expert witnesses. The effect of such a result could be to increase civil litigation. Personal injury suits comprise the majority of civil suits,[30] but, as *Person* notes, experts are essential in many other areas of the law as well: "malpractice cases against practitioners in various professional fields, product liability cases involving questions of design, malfunction and defect, patent and copyright cases, desegregation cases, obscenity control cases . . . ."[31] Moreover, with the ability to contract freely for expert services, more private suits in the public interest might be encouraged under the private attorney general theory.[32] Although Person required experts for his antitrust suit, certain other federal and state laws seek to encourage citizen participation in enforcement. The Clean Air Act of 1970,[33] for example, and Pennsylvania's Air Pollution Control Act,[34] provide that a successful litigant can collect both attorney's and expert's fees.[35] These acts recognize that the expert's services are as essential as the attorney's when litigating a highly technical case. *Person*, however, would take these statutes one step further in encouraging the citizen to bring suit. It is no help to recover fees, if successful, if one cannot contract with the expert at the onset of litigation.

With scant support from the case law, and opposition from the commentators, *Person* strikes out into new territory by invalidating the long-standing prohibition against contingent fee contracts with expert witnesses. No less a *tour de force* is the fact that *Person* considers a rule

29. Sanctions against contingent fee contracts with experts have been strong. Courts have refused to uphold such a contract against a defaulting party despite the fact that a service has been rendered. Belfonte v. Miller, 212 Pa. Super. Ct. 508, 243 A.2d 150 (1968). An attorney was disbarred, not on the basis of a court rule violtion but on the basis of violation of the common law, for negotiating such a contract. *In re* Schapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911). One court has gone so far as to recommend investigation for the purpose of prosecuting a physician who had collected a fee that was a percentage of the plaintiff's recovery. Davis v. Smoot, 176 N.C. 538, 97 S.E. 488 (1918).

30. According to the *Wall Street Journal*, October 14, 1963, at 1, col. 1, eighty percent of civil jury cases in the United States are personal injury cases and the majority of them turn on medical questions.

31. 414 F. Supp at 146.

32. The concept of the private attorney general was suggested by Jerome Frank in Associated Indus. v Ickes, 134 F.2d 694, 704 (2d Cir. 1943). Under the private attorney general theory a private plaintiff can litigate a question of public interest, to enforce environmental legislation for example, with the result that attorney's fees can be recovered. *See also*, Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 794 (1975); Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343, 385-405 (1974); Steinberg, *Is the Citizen Suit a Substitute for Class Action in Environmental Litigation? An Examination of the Clean Air Act of 1970 Citizen Suit Provision*, 12 SAN DIEGO L. REV. 107 (1974).

33. 42 U.S.C. §§ 1857-1858a (1970).

34. PA. STAT. ANN. tit. 35, §§ 4001-4015 (Purdon 1964).

35. 42 U.S.C. § 1857h-2 (d) (1970); PA. STAT. ANN. tit. 35, § 4010 (f) (Purdon Supp. 1976-77).

designed for attorney discipline and finds it violative of the Constitution because it unreasonably denies indigent and less affluent litigants access to the courts. The court redresses that wrong simply. Irrespective of the treatment *Person* receives in subsequent cases, it forces reexamination of how the important policy goal of unbiased, unperjured expert testimony may be achieved.

[Casenote by M. Hannah Leavitt.]

CRIMINAL LAW—RENEWAL OF INTERROGATION AFTER ASSERTION OF THE RIGHT TO REMAIN SILENT. *Commonwealth v. Reiland*, — Pa. Super. Ct. —, 359 A.2d 811 (1976).

A majority[1] of the Pennsylvania Superior Court ruled in *Commonwealth v. Reiland*[2] that under certain circumstances a confession obtained after a suspect has been advised of his constitutional rights, as prescribed by *Miranda v. Arizona*,[3] and has exercised his right to remain silent, may be admissible against him at trial.[4] The ruling broadens the power of the police to seek a waiver by a suspect in custody of his constitutional right to remain silent.[5] The court adopted the test of "whether [the suspect's] 'right to cut off questioning' was 'scrupulously honored' " during interrogation,[6] a test employed by the Supreme Court in *Michigan v. Mosley*.[7] Gaged against this standard, police procedure that included immediate cessation of questioning after assertion of constitutional rights and complete warnings prior to requestioning was held to comply with constitutional mandates.[8]

Richard Keith Reiland was arrested at his home for burglary, was orally given *Miranda* warnings, and was asked a follow-up question.

1. Six judges joined the majority opinion, while Judge Spaeth concurred.
2. — Pa. Super. Ct. —, 359 A.2d 811 (1976).
3. 384 U.S. 436 (1966). Briefly stated, the landmark *Miranda* decision provided a set of guidelines aimed at eliminating the physical and psychological coercion inherent in custodial interrogation. To protect the individual's privilege against self-incrimination, the Court required clear warnings, prior to interrogation, that a suspect has the right to remain silent, any statement may be used as evidence against him, and he has a right to consult with an attorney, retained or appointed if he is indigent. Any waiver of these rights must be voluntary, knowing and intelligent. If all of these rights are not explained, the confession is presumed the product of coercion and is inadmissible in court as evidence. *Id.* at 444-45. *Miranda* was expressly adopted as controlling in Pennsylvania in Commonwealth v. Schmidt, 423 Pa. 432, 224 A.2d 625 (1966).
4. — Pa. Super. Ct. at —, 359 A.2d at 814.
5. *See* notes 47-51 and accompanying text *infra*.
6. — Pa. Super. Ct. at —, 359 A.2d at 814.
7. 423 U.S. 96 (1975).
8. — Pa. Super. Ct. at —, 359 A.2d at 814. Because Reiland was given *Miranda* warnings on three occasions, twice prior to interrogation sessions and once again when a tape was made subsequent to his confession, the superior court held that his rights were scrupulously honored. *Id.* at —, 359 A.2d at 814. The court noted that had the statement been taken in the absence of counsel after a request for counsel, then the statement would have been suppressed. *Id.* at —, 359 A.2d at 813. *See* note 51 *infra*.

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Upon his refusal to respond he was transported to police headquarters. Questioning, which resulted in an incriminatory statement, was resumed following new warnings within twenty minutes of his original refusal.[9] When the trial court denied his motion to suppress the statement and additional incriminating evidence, Reiland entered a plea of guilty. On appeal[10] he maintained that his plea was involuntarily entered because it was motivated in part by a confession obtained in violation of his constitutional rights.[11] The court rejected this contention, finding the police conduct lawful in the light of *Mosley* and holding, therefore, that his plea was voluntary.[12]

Reiland based his contention upon the following statement in *Miranda*:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.[13]

Miranda clearly foreclosed any further attempt to obtain information immediately after assertion of the right to silence, but failed to clarify the issue of whether and when interrogation may be renewed in the event an individual chooses to remain silent but does not request counsel.[14] A restrictive reading of this passage would preclude further questioning in the

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9. — Pa. Super. Ct. at —, 359 A.2d at 815. The arrest and initial warnings occurred at approximately 4:05 a.m. and questioning was resumed at approximately 4:25 a.m. by a different set of officers. *Id.* at —, 359 A.2d at 815.

10. Appeal was taken pursuant to the Post Conviction Hearing Act, 19 PA. CONS. STAT. §§ 1180-1 to -14 (Supp. 1976-77). A petition filed pursuant to the Act was dismissed without a hearing. Subsequently an appeal asking that the case be remanded for an evidentiary hearing was granted per curiam. The superior court heard the present case on appeal from denial of post-verdict motions granted after the evidentiary hearing.

11. — Pa. Super. Ct. at —, 359 A.2d at 812-13. Appellant's contention was that his plea was motivated by physical evidence seized during a warrantless search of his bedroom with the consent of his mother and by a confession obtained in the absence of counsel after a request for counsel. *Id.* at —, 359 A.2d at 813. The court ruled that the mother's consent was both authorized and voluntary and there was no evidence of a request for counsel. *Id.* at —, 359 A.2d at 813-14. They then proceeded to discuss whether a confession obtained after an expressed desire for silence was admissible.

12. *Id.* at —, 359 A. 2d at 814. In order to collaterally attack a guilty plea in Pennsylvania, an appellant must demonstrate:

> (1) an involuntary pre-trial confession (or presumably any other constitutionally infirm incriminating evidence); (2) that the guilty plea was primarily motivated by such evidence; and, (3) that defendent was incompetently advised by counsel to plead guilty, in the circumstances, rather than stand trial.

Commonwealth v. March, 440 Pa. 590, 593, 271 A.2d 481, 483 (1970). *Accord*, Commonwealth v. Reiland, —Pa. Super. Ct. —, —, 359 A.2d 811, 813 (1976). The superior court did not discuss the second and third components of the test, ruling the first prerequisite had not been met. *Id.* at —, 359 A.2d at 815.

13. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) (footnote omitted).

14. *Miranda* provided that interrogation must cease after a request for assistance of counsel until an attorney is present. *Id.* at 474-75.

absence of a lawyer on the assumption that the pressures of a custodial setting may produce a waiver that is the product of subtle coercion.[15] Only two states follow this strict interpretation, providing that only the suspect may reinitiate discussion of the crime.[16]

Most states, concerned with the effectiveness of police activity, have adopted less stringent standards of admissibility, focusing either upon the voluntary nature of the waiver or the conduct of the officers who secure the admission. States adopting the "voluntary waiver" approach maintain that the prosecution must prove a voluntary, knowing and intelligent waiver prior to reinterrogation as a predicate to the admissibility of statements obtained thereby. This burden has generally been sustained by showing a lack of coercion, force, or intimidation—usually in conjunction with a significant period of time—and repetition of full *Miranda* warnings.[17] Other "voluntary waiver" jurisdictions, including the Eastern District of Pennsylvania,[18] seek additional evidence to substantiate allegations of a voluntary change of mind.[19] Under the "police conduct" approach, by contrast, a waiver following new warnings is presumed voluntary, absent evidence of coercion, if the police have met a certain standard of conduct—specifically, if they have refrained from further questioning at that time.[20] Under this test investigators are conceded the privilege of asking a suspect

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15. The American Law Institute recommended that police be precluded from seeking a waiver without the presence of a lawyer after the assertion of any right:

> [E]ven a seemingly voluntary waiver given after a person has once indicated he does not wish to cooperate may be the product of subtle coercion; the very passage of time while a person continues to be in police detention will create fears and pressures undermining the will to insist on one's right to silence . . . . The court's language in *Miranda* seems to be consistent with this view.

ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.8(2)(d), Comment at 52 (1975).

16. State v. Kroupa, 16 Ariz. App. 254, 492 P.2d 750 (1972); People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968).

17. People v. Pittman, 55 Ill. 2d 39, 302 N.E.2d 7 (1973) (twenty-four hours elapsed between questioning sessions); Conway v. State, 7 Md. App. 400, 256 A.2d 178 (1969) (sixteen hours elapsed before requestioning). Cases not requiring lapse of a "significant period of time" relied heavily on the defendant's right to change his mind. *See, e.g.*, State v. Robinson, 87 S.D. 375, 209 N.W.2d 374 (1973) (fifteen minutes); State v. McClelland, 164 N.W.2d 189 (Iowa 1969) (thirty minutes).

18. United States v. Choice, 392 F. Supp. 460 (E.D. Pa. 1975). During the first interrogation session, the defendant was in the hospital, badly wounded, and did not acknowledge the presence of the officer, who gave no warnings and asked no questions. A statement was obtained the following day after warnings were given. The court said the length of time belied a finding of a voluntary change of mind, but warned that "[i]n some circumstances . . . prior assertion of *Miranda* rights may render inadmissible a subsequent confession, particularly when interrogation continues after refusal by the suspect to speak . . . or is resumed shortly thereafter." *Id.* at 467 (citations omitted).

19. Hill v. Whealon, 490 F.2d 629 (6th Cir. 1974) (defendant knew that when he refused to answer police would ask no further questions); State v. Estrada, 63 Wis. 2d 476, 217 N.W.2d 359 (1974) (voluntary statement by defendant); State v. Bishop, 272 N.C. 283, 158 S.E.2d 511 (1968) (all defendants were offered counsel prior to next interrogation session).

20. The primary consideration of the courts using this approach is whether "police refuse to take no for an answer." *E.g.*, Jennings v. United States, 391 F.2d 512, 515 (5th Cir. 1968). *Accord*, People v. Naranjo, 181 Colo. 273, —, 509 P.2d 1235, 1237 (1973). While the Pennsylvania Supreme Court tends to utilize the "police conduct" approach, it circumscribes the power of law officers to seek a waiver. Prior to *Reiland* the only supreme court case dealing specifically with reinterrogation after a suspect invokes his right to silence was Commonwealth v. Grandison, 449 Pa. 231, 296 A.2d 730 (1972). In that case, ten hours after the suspect's initial refusal to speak, police discovered additional unrelated charges pending, and the confession subsequently obtained from renewed questioning was admissible at trial. The discovery of the unrelated crime justified additional interrogation because it constituted a "substantial change in circumstances." *Id.* at 234, 296 A.2d at 731.

to reconsider his refusal[21] and, in some jurisdictions, there is no limit to the number of interrogation sessions.[22]

The United States Supreme Court had occasion to review these diverse standards when, in 1975, it granted certiorari for review of *People v. Mosley*.[23] In that case the Michigan Court of Appeals held that after an election to remain silent any statement that was the product of reinterrogation was barred by *Miranda*.[24] The Supreme Court's opinion, however, rejected the proposition that *Miranda* "created a *per se* proscription on questioning of infinite duration," reasoning that such a rule would establish irrational barriers to legitimate police investigation and deprive a suspect of any information about his legal position.[25] Without commenting on the merits of lower court decisions, the majority identified as the critical factor in determining admissibility whether police "scrupulously honor" the "right to cut off questioning."[26] The safeguards present in *Mosley*—immediate discontinuation of the initial interrogation, passage of a "significant period of time," thorough rewarning by a different police officer, and concentration on an unrelated crime—satisfied this standard.[27] In approving police conduct in this instance,[28] the Court reasoned that compliance with a suspect's request to terminate questioning counteracts the coercive pressures of the interrogation setting by giving him control over the substance and duration of questioning. Furthermore, questioning regarding a different crime does not undercut a previous decision to remain silent.[29]

The practical effect of the Court's use of such broad language to sanction investigatory procedures in the unique situation *Mosley* posed, without providing further guidelines, was to create a vague test susceptible

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21. Massimo v. United States, 463 F.2d 1171 (2d Cir. 1972); State v. O'Neill, 299 Minn. 60, 216 N.W.2d 822 (1974). In *O'Neill*, police urging was considered appropriate when a suspect was not fully cognizant of his situation, as long as it was not compulsive in any way.

22. United States v. Collins, 462 F.2d 792 (2d Cir. 1972) (defendant was warned and questioned six times, the last three sessions within one hour); United States v. Brady, 421 F.2d 681 (2d Cir. 1970) (five times); People v. Naranjo, 181 Colo. 273, 509 P.2d 1235 (1973) (three times). *Contra*, State v. Godfrey, 182 Neb. 451, 155 N.W.2d 438 (1968).

23. 51 Mich. App. 105, 214 N.W.2d 564 (1974).

24. The Michigan court held that shifting a suspect to a different interrogator could not justify a subsequent interrogation.

25. 423 U.S. 96, 102 (emphasis in original).

26. *Id.* at 104. The Court split 6-2. Justice Brennan's dissent criticized the rule for its ambiguity and continued erosion of the *Miranda* principles. *Id.* at 112.

27. *Id.* at 106. Mosley was not questioned for over two hours after his initial refusal to speak.

28. The issue was confined exclusively to "whether the conduct of the Detroit police that led to Mosley's incriminating statement did, in fact, violate the *Miranda* 'guidelines,' so as to render the statement inadmissible . . . at his trial." *Id.* at 100.

29. *Id.* at 105. The court's reasoning has been criticized as rejection of the fundamental principle of *Miranda* that

> inherent coercion is always present in a custodial atmosphere . . . . As evidence of this 'counteraction,' the Court cited the more than two hour delay between interrogations. But under *Miranda*, this delay would be characterized as part of the custodial atmosphere that cannot help but wear down the accused's will to resist. Similarly the fact that a different police officer conducted each interrogation and that different subjects were discussed at each could also be cited as evidence of inherent coercion.

54 N.C.L. REV. 625, 703 (1976).

to inconsistent interpretations.[30] Thus, in the months following the decision, *Mosley* was cited both to condemn and to condone police practices such as immediate follow-up inquiries after an election to remain silent,[31] questioning about the same crime after a considerable lapse of time,[32] and interrogation concerning the same subject after a relatively brief period of time.[33] An examination of which aspect of *Mosley* each court chose to emphasize demonstrates how easily contradictory conclusions can be based on one case. Decisions placing more restrictions on police activity relied heavily on factual distinctions and the Court's analysis of the facts,[34] while cases that echoed *Mosley's* unqualified rejection of a per se ban on all further interrogation downplayed or omitted the facts.[35]

In *Reiland* the superior court exhibited the same tendency to ignore the Court's reasoning upon the unique facts of *Mosley* as had the more permissive jurisdictions. Without examining the factual differences between the cases, it ruled that admissibility was contingent upon police honoring a suspect's right to cut off questioning, concluding that immediate cessation of questioning and new *Miranda* warnings satisfied this requirement.[36] In particular, the court ignored two factors considered significant in *Mosley*—a lapse of two hours between interrogation sessions[37] and questioning about an unrelated crime—factors that were modified or nonexistent in *Reiland*.[38] Furthermore, in *Mosley*, the Supreme Court had implied that interrogation concerning the same crime could coercively undermine the will of an accused in holding to his previous decision to remain silent;[39] yet the superior court failed to even consider the possibility of coercion. By dispensing with the safeguards

30. 54 N.C.L. REV. 625, 703 (1976).

31. *Compare* Hearne v. State, 534 S.W.2d 703 (Tex. Crim. App. 1976) (confession inadmissible when questioning did not cease), *and* State v. Sauve, 112 Ariz. 576, 544 P.2d 1091 (1976) (confession inadmissible when defendant was shown additional evidence immediately after he refused to speak), *with* United States v. Davis, 527 F. 2d 1110 (9th Cir. 1975) (confession admissible when police immediately showed new evidence and urged reconsideration), *and* Taylor v. Riddle, 409 F. Supp. 631 (W.D. Va. 1976) (confession admitted when police made a gentle probe, asking about other evidence).

32. *Compare* United States v. Olaf, 527 F.2d 752 (9th Cir. 1975) (confession suppressed when object of second session was to make suspect change his mind three hours later), *with* State v. Robbins, 15 Wash. App. 108, 547 P.2d 288 (1976) (confession upheld when sessions were separated by two days).

33. *Compare* United States v. Clayton, 407 F. Supp. 204 (E.D. Wis. 1976) (confession inadmissible when suspect questioned twice within one hour), *with* Commonwealth v. Reiland, — Pa. Super. Ct. —, 359 A.2d 811 (1976) (confession upheld when sessions were twenty minutes apart).

34. *See, e.g.*, United States v. Clayton, 407 F. Supp. 204 (E.D. Wis. 1976); State v. Sauve, 112 Ariz. 576, 544 P.2d 1091 (1976).

35. *See, e.g.*, United States v. Davis, 527 F.2d 1110 (9th Cir. 1975); State v. McDonald, 195 Neb. 625, 240 N.W.2d 8 (1976).

36. Commonwealth v. Reiland, — Pa. Super. Ct. —, —, 359 A.2d 811, 814 (1976).

37. Michigan v. Mosley, 423 U.S. 96, 106 (1975). While the *Mosley* court does not explain the basis of the requirement of a significant period of time, lower courts cited the length of time to illustrate that the defendant was not under continuous pressure to confess, People v. Pittman, 55 Ill. 2d 39, 302 N.E.2d 7 (1973), or that the suspect had time to reflect, discuss his options with others and change his mind, State v. Estrada, 63 Wis. 2d 476, 217 N.W.2d 359. (1974).

38. — Pa. Super. Ct. at —, 359 A.2d at 816. In *Reiland* questioning was suspended for only twenty minutes and concerned the same subject.

39. *See* note 29 and accompanying text *supra*.

provided by suspension of questioning for a "significant period of time" regarding an unrelated crime, the decision clearly extends the *Mosley* rule.[40]

This extension could be explained by the inapplicability of tests previously developed by the Pennsylvania Supreme Court in similar situations,[41] the lack of evidence or allegation that the statement was in any way traditionally involuntary,[42] and the "equivocal" nature of Reiland's original assertion of silence.[43] The court was reluctant to exclude the statement as probative evidence when it considered his original election to remain silent debatable. Caught between the logical view that a completely voluntary confession should be admissible and *Miranda's* dictates that any statement must be excluded unless a procedure designed to protect criminals against coercion is meticulously followed, the court chose to extend the test to encompass a different set of circumstances, seemingly satisfying both goals.

Because of the variance between the facts in the two cases the superior court was not bound to adopt the *Mosley* test,[44] but, having decided to do so, should have suppressed the confession.[45] This conclusion would be consistent with the Pennsylvania Supreme Court's interpretation of *Miranda v. Arizona*[46] in *Commonwealth v. Grandison*.[47] In *Grandison* the court approved police-initiated interrogation regarding an unrelated crime but stated in dictum that "there is no question that . . . a refusal to answer questions . . . precluded further questioning at that time concerning [the

40. Commonwealth v. Reiland, — Pa. Super. Ct. —, —, 359 A.2d 811, 816 (1976) (Spaeth, J., concurring).

41. Although the majority did not appear to consider them, the only supreme court cases that considered when police may renew interrogation provided rules that were too narrow to cover *Reiland*. *See* note 20 *supra*; note 51 and accompanying text *infra*.

42. Commonwealth v. Reiland, — Pa. Super. Ct. —, —, 359 A.2d 811, 813 (1976). The traditional test of voluntariness focuses on the capacity and willingness of the suspect to make a confession: "[I]f a defendant's mind and will are confused or burdened by promises of advantage, threats, physical or psychologcial abuse, or other improper influences any statement which he then makes is involuntary." Murphy, *Proposed Standard Instructions on Confessions and Admissions*, 75 DICK. L. REV. 560, 565 (1971). Under these guidelines Reiland's confession would probably be admissible. Nevertheless, *Miranda* added other prerequisites for admissibility. *See* note 3 *supra*.

43. — Pa. Super. Ct. —, —, 359 A.2d 811, 813 (1976). The police read him his rights from a card and asked the follow-up question, "Having these rights in mind, do you wish to talk to us now?" Reiland's response, according to the testimony of the arresting officer, was difficult to interpret. " '[H]e sort of didn't want to say anything, like he did, but not right there.' " — Pa. Super. Ct. at —, 359 A.2d at 813. The superior court characterized his answer as "equivocal," ostensibly basing its decision on the assumption that this response was an assertion of the right to silence. This is consistent with *Miranda's* ruling that an individual who indicates in any manner an unwillingness to speak invokes his right to remain silent. Miranda v. Arizona, 384 U.S. 436, 445 (1966); *accord*, State v. O'Neill, 299 Minn. 60, 216 N.W.2d 822 (1974). The *Reiland* court, however, continued to view his assertion as tentative: "Assuming appellant's initial equivocation at the time of arrest to be a desire to remain silent, his subsequent confession was nevertheless admissible pursuant to the standards set forth in *Mosley*." — Pa. Super. Ct. at —, 359 A.2d at 814.

44. The *Mosley* case was so limited to its own facts that it need not be adopted in dissimilar situations. *See, e.g.*, Pulliam v. State, 236 Ga. 460, 224 S.E.2d 8 (1976) (*Miranda* test applied); State v. Stewart, 325 So. 2d 819 (La. 1976) (applying traditional voluntariness test). *See* note 28 *supra*.

45. *See* notes 48-51 and accompanying text *infra*.

46. 384 U.S. 436 (1966).

47. 449 Pa. 231, 296 A.2d 730 (1972).

original] subject."[48] This statement, considered in conjunction with *Mosley's* requirement of a "significant" lapse of time,[49] suggests a Pennsylvania Supreme Court interpretation that resumption of questioning about the same crime within a relatively short period of time will not adequately protect an individual's right to remain silent.[50] Thus, in *Reiland*, mere forbearance from questioning for a twenty-minute period solely for the purpose of transportation and processing is not consistent with the Supreme Court's goal of protecting the rights of suspects in custody through strict adherence to *Miranda* procedures—even at the expense of suppressing an unquestionably voluntary confession.[51] Therefore, if the court chose to adopt *Mosley*, it should also have provided some guidance for its application to avoid future problems of interpretation—for example, allowing questioning only after passage of a "significant period" of time[52] and for limited purposes. These purposes may include explaining newly discovered evidence[53] or changed circumstances,[54] questioning regarding a different incident,[55] and ascertaining whether an individual has voluntarily changed his mind.[56]

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48. *Id.* at 234, 296 A.2d at 731. *See* note 20 *supra*.

49. Michigan v. Mosley, 423 U.S. 96, 106 (1975). Justice White interpreted the majority opinion as requiring cessation of questioning for an unspecified length of time; otherwise, the confession is to be excluded automatically. *Id.* at 107.

50. For example, on facts strikingly similar to those of *Reiland*, it was ruled that a confession obtained by reinterrogation resumed wtihin an hour after invocation of fifth amendment rights was inadmissible. The court held that *Miranda* as construed in *Mosley* "mandates that 'interrogation must cease' *at least* with respect to the same crime and the same interrogating officer for a substantial period of time." United States v. Clayton, 407 F. Supp. 204, 207 (E.D. Wis. 1976) (emphasis in original). Questioning resumed "as a practical matter" when defendant was transported to another building, processed and readvised; thus "defendant's invocation of his right to remain silent was not accorded the respect it was due by the interrogating officer." *Id.*

51. Although in *Reiland* the entire superior court indicated that Reiland's confession was correctly ruled admissible, the majority, citing *Miranda*, noted that had he instead requested a lawyer and had his subsequent statement been obtained in absence of counsel, "then the confession should clearly have been suppressed." Commonwealth v. Reiland, — Pa. Super. Ct. —, —, 359 A.2d 811, 813 (1976). *Miranda* provided that interrogation must cease, following a request for an attorney, until counsel is present, but did not preclude a subsequent waiver of this right, if it was voluntarily, knowingly and intelligently made. Miranda v. Arizona, 384 U.S. 436, 474-75 (1966). Because of this mandate the Pennsylvania Supreme Court carefully scrutinized the circumstances surrounding confession after a previous request for a lawyer, holding that police may seek a waiver when justified by a "changed situation." Commonwealth v. Jefferson, 445 Pa. 1, 281 A.2d 852 (1971) (death of victim ten days later made the crime more serious). While a voluntary reversal of position by a suspect was generally sufficient to sustain the Commonwealth's heavy burden of proving a waiver, Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973); Commonwealth v. Franklin, 438 Pa. 411, 265 A.2d 361 (1970); Commonwealth v. Leaming, 432 Pa. 326, 247 A.2d 590 (1968), the supreme court, in one instance, supressed a defendant-initiated confession. Commonwealth v. Youngblood, 453 Pa. 225, 307 A.2d 922 (1973). In that case after several hours of custody, a fifteen year old youth sent his sister to contact an attorney and within five minutes proceeded to confess. The court recommended further inquiry into the individual's understanding of his constitutional rights prior to interrogation and one factor considered in reaching this conclusion was the brief period of time separating his request for and waiver of the right to counsel. *Id.* at 234, 307 A.2d at 927.

52. Determination of the minimal length of the period between questionings could best be solved by examining on a case by case basis whether the suspect was in constant police company or had time to reflect, to consult with others, and to make a voluntary and intelligent choice. *See* note 37 *supra*.

53. State v. Godfrey, 182 Neb. 451, 155 N.W.2d 438 (1968).

54. Commonwealth v. Jefferson, 445 Pa. 1, 281 A.2d 852 (1971).

55. Commonwealth v. Grandison, 449 Pa. 231, 296 A.2d 730 (1972).

56. United States v. Jackson, 436 F.2d 39 (9th Cir. 1970).

Adoption of the vague *Mosley* test with the liberal interpretation given it by the superior court may result in the admission of confessions in circumstances more coercive than in *Reiland*,[57] since all that is necessary to prove a waiver is to show immediate cessation of questioning and new warnings.[58] For example, after an initial suspension of interrogation, police may resume questioning at will with no caveat that the new session serve a limited purpose.[59] A suspect who is subjected to additional interrogation shortly after a prior refusal that deals with the same subject and injects no new considerations may justly feel that his examiners do not respect his wishes and decide to cooperate because it would be futile to resist.[60] Moreover, *Reiland* places no limit on the number of times police may seek a waiver. Provision for new warnings coupled with the compulsion many feel to confess[61] is poor protection against the subtle coercion of repeated attempts to solicit admissions.[62] When a confession obtained under these circumstances is challenged, the trial court will determine if the "right to cut off questioning" was "scrupulously honored." Because *Reiland*'s only prerequisites for admissibility are cessation of questioning and new warnings, a finding of these elements will be difficult to overturn.[63]

By abolishing any requirement that the subject voluntarily reverse his position or that only in changed circumstances may police approach a subject, *Reiland* greatly expands the power of the police to seek a constitutional waiver. Thus the effectiveness of the *Miranda* warnings may be diminshed: although suspects must be told of their rights during

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57. 54 N.C. L. REV. 625, 704 (1976). *Reiland* has not been appealed, so the decision will provide a liberal precedent to the trial courts.

58. *See* note 40 and accompanying text *supra*.

59. *See* notes 52-56 and accompanying text *supra*.

60. The suspect arrested and brought downtown for questioning is in a crisis-laden situation. The stakes for him are high—often his freedom for a few or many years—and his prospects hinge on decisions that must be quickly made . . . . Unless he is a professional, the suspect is unlikely to know . . . [t]he likely consequences of the alternatives open to him[,] . . . how much leniency cooperation may earn [and] . . . how much a steadfast refusal to talk may contribute to a decision by the police, prosecutor or judge to 'throw the book' at him.

Interrogations in New Haven: The Impact of Miranda, 76 YALE L.J. 1519, 1613-14 (1967).

61. One commentator in assessing the social and psychological pressures in an interrogation situation noted that "men have a 'compulsive, unconscious tendency to confess' " and that "the urge to talk is almost certainly intensified by the host of fears generated by the interrogation situation." Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 57 (1968).

In *Miranda* the Supreme Court condemned as psychologically coercive a technique in which police temporarily concede to the accused the right to remain silent, knowing that it has an undermining effect because the suspect feels the disapproval of the interrogator, and then pointing out the incriminating significance of the individual's silence. Miranda v. Arizona, 384 U.S. 436, 453-54 (1966). Requestioning without a change in circumstances in fifteen or twenty minutes may have the same effect, despite a new warning. *Cf.* Commonwealth v. Franklin, 438 Pa. 411, 265 A.2d 361 (1970) (Pomeroy & Cohen, JJ., dissenting).

62. "It is . . . unrealistic to assume that a *Miranda* warning will minimize the coercive atmosphere, since the notification requirement can be satisfied (and probably often is) by mere mechanical recitation of the accused's rights." Note, *Confessions by the Accused—Does Miranda Relate to Reality?*, 62 KY. L.J. 794, 808 (1974).

63. Commonwealth v. Williams, 447 Pa. 206, 290 A.2d 111 (1972) (appellate courts must accept as binding all evidence favorable to the verdict winner).

questioning, by court-approved police procedures they may subtly be denied the opportunity to exercise them.[64]

CRIMINAL LAW—QUANTUM OF EVIDENCE NECESSARY TO SUPPORT INFERENCE OF INTENT TO DELIVER HEROIN. *Commonwealth v. Harris*, — Pa. Super. Ct. —, 359 A.2d 407 (1976).

In *Commonwealth v. Harris*[1] a divided Pennsylvania Superior Court[2] delineated the quantity of evidence required to support an inference of intent to deliver a possessed controlled substance, heroin. Expressly following the reasoning of *Commonwealth v. Santiago*,[3] the court held that under the proper facts and circumstances[4] mere evidence of possession of a sufficient quantity of a controlled substance will permit an inference of intent to deliver.[5] *Harris* extends the prior holding in *Commonwealth v. Hill*[6] by permitting expert opinion testimony alone to supply "sufficient other facts to support the inference" of intent to deliver.[7]

Following a non-jury trial, Carl T. Harris was convicted of possession of a controlled substance[8] and of possession with intent to deliver a controlled substance.[9] Evidence had been introduced showing Harris to have been in possession of sixteen "half-spoons" of heroin (approximately eighty grams).[10] The arresting officer, testifying as an expert on narcotics matters, stated that this amount was more than would be possessed by an addict for personal use.[11] On appeal Harris challenged this evidence as insufficient to support a conviction for possession with intent to deliver. The court found this contention to be without merit and affirmed.[12]

In reaching the conclusion that *Harris* was covered by *Commonwealth v. Santiago*[13] the court dismissed considerable factual differences

64. Commonwealth v. Franklin, 438 Pa. 411, 265 A.2d 361 (1970) (dissent). [Casenote by Barbara L. Romberger.]

1. — Pa. Super. Ct. —, 359 A.2d 407 (1976).
2. The court divided five to two. Judges Watkins, Jacobs, Price, Van der Voort and Cercone were in the majority; Judge Hoffman was joined by Judge Spaeth in dissent.
3. 462 Pa. 216, 340 A.2d 440 (1975).
4. *See* notes 28, 56 and accompanying text *infra*.
5. — Pa. Super. Ct. at —, 359 A.2d at 408.
6. 236 Pa. Super. Ct. 572, 346 A.2d 314 (1975). *Hill* affirmed a conviction for "trafficking" in narcotics under the former Pennsylvania Drug, Device and Cosmetic Act. The court held, *inter alia*, that evidence of a specific sale or attempted sale of narcotics was unnecessary if there was a sufficient quantity of narcotics, coupled with other factors present.
7. — Pa. Super. Ct. at — n.3, 359 A.2d at 408 n.3.
8. 35 PA. CONS. STAT. ANN. § 780-113(a) (16) (Purdon Supp. 1976).
9. 35 PA. CONS. STAT. ANN. § 780-113 (a) (30) (Purdon Supp. 1976).
10. — Pa. Super. Ct. at — n.1, 359 A.2d at 410 n.1.
11. *Id.* at —, 359 A.2d at 410.
12. *Id.* at —, 359 A.2d at 410.
13. 462 Pa. 216, 340 A.2d 440 (1975). *Santiago* relied heavily on federal precedent. *See, e.g.*, United States v. King, 485 F.2d 353 (10th Cir. 1973); United States v. Mather, 465 F.2d

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between the two cases.[14] *Santiago* had held that possession of a sufficient quantity of a drug, under the proper facts and circumstances, will permit the inference that the possessor had the requisite intent to deliver the drug.[15] The validity of the inference of intent to distribute depends on the amount of narcotics in his possession:[16]

> The 'intent' with which a controlled substance is possessed is generally established through circumstantial evidence and in this regard we have held that the quantity of the drug possessed is a circumstance which may permit the inference that the possessor had an intent to sell, deliver or otherwise distribute . . . . The statute clearly, and without vagueness, makes unlawful the possession of any controlled substance with an intent to distribute. The question as to the quantity which would permit the inference that the possessor had an intent to [deliver] is evidentiary in nature and necessarily depends on all the facts and circumstances of the case at hand, and mention thereof in the statute is entirely unnecessary.[17]

In *Santiago* the vast cache of drugs and drug paraphernalia that were seized provided a surfeit of evidence to allow the jury to convict for possession with intent to deliver.[18] The issue of the *minimum* quantum of evidence necessary to permit the inference of intent to deliver, however, surfaced for the first time in *Commonwealth v. Wright*,[19] a recent case inexplicably unmentioned in the *Harris* opinion.[20]

1035 (5th Cir. 1972). *See also* United States v. Echols, 477 F.2d 37 (8th Cir. 1973) (defendant's possession of 199.73 grams of very pure cocaine worth $200,000 while in interstate travel by commercial airline was sufficient to justify the inference of intent to distribute); United States v. Ortiz, 445 F.2d 1100 (10th Cir. 1971) (defendants arrested while manufacturing methamphetamine with 8 ½ pounds of the substance in possession); United States v. Cerrito, 413 F.2d 1270 (7th Cir. 1969) (defendant convicted of possession and sale of amphetamine tablets and of intent to deliver counterfeit tablets).

14. Language in *Harris* conveys the court's discomfort with the quantum of evidence. — Pa. Super. Ct. at —, 359 A.2d at 408. On the other hand, the evidence in *Santiago* was overwhelming:

> [T]he package was identified as a bundle of twenty-five packets of heroin. Seventeen other bundles were found on the bed, around which [the defendants] were seated. Also on the bed were strainers, spoons, razor blades, hundreds of empty glassine packets, and rubber bands. Two additional pouches containing another half a pound of heroin were found under the bed. The trial judge characterized this as a wholesale drug operation for cutting and bagging heroin which had an estimated "street value" exceeding $250,000.00.

Commonwealth v. Santiago, 462 Pa. 216, 221, 340 A.2d 440, 442 (1975).

15. Commonwealth v. Santiago, 462 Pa. 216, 223, 340 A.2d 440, 444 (1975).

16. United States v. Mather, 465 F.2d 1035, 1037 (5th Cir. 1972); *quoted in* Commonwealth v. Santiago, 462 Pa. 216, 224, 340 A.2d 440, 444 (1975). Mather was convicted of possession of cocaine with intent to deliver under the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, which contains a provision similar to the Pennsylvania statute: "[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." 21 U.S.C. § 841(a)(1) (1970). The Act has been consistently interpreted in the federal court to allow the quantity and value of the narcotic as circumstantial evidence from which to infer the purpose and intent with which it is possessed.

17. United States v. King, 485 F.2d 353, 356-57 (10th Cir. 1973); *quoted in* Commonwealth v. Santiago, 462 Pa. 216, 224-25, 340 A.2d 440, 444 (1975). King was convicted of knowingly possessing with an intent to distribute approximately 602 pounds of marihuana, a Schedule I controlled substance under 21 U.S.C. § 812(c),(c)(10) (1970), in violation of 21 U.S.C. § 841(a)(1) (1970).

18. *See* note 14 *supra*.

19. 234 Pa. Super. Ct. 83, 339 A.2d 103 (1975).

20. *Wright* is more on point with *Harris* than either *Santiago* or *Hill* because of the marginal amount possessed and the paucity of other supporting facts and circumstances. *See* note 27 *infra*.

Wright, which was decided by the same divided court[21] that later decided *Harris*, affirmed a conviction for possession with intent to deliver a controlled substance upon considerably less compelling evidence than was offered in either *Santiago* or *Hill*: "[T]he trial court [in *Wright*] relied upon three factors: a) the evidence that [defendant] was not an addict; b) the narcotic being the type which was usually sold to addicts; and, c) the quantity of heroin involved."[22]

The defendant in *Wright*, who alleged addiction, was examined by the arresting officer. He later testified that the defendant was *not* an addict because certain physical indicia of drug addiction were lacking from the defendant's person.[23] The police officer, "despite experience in drug investigations, had no special training to establish expertise in identifying drug addicts."[24] "[T]he officer admitted [at trial] that he did not know what [the indicia] looked like."[25] The dissent considered this testimony to be "so speculative as to be of little value."[26]

The dissent remained unconvinced that the mere amount possessed by the defendant,[27] absent additional supportive evidence, was sufficient to permit the inference of intent to deliver. It proffered instead a catalogue of common empirical facts and circumstances to support an inference of intent when the amount of narcotics possessed is equivocal, that is, when the amount could be intended either for delivery or for personal use.[28]

Wright and *Harris* demonstrate confusion and error in Pennsylvania case law concerning the sufficiency of evidence to prove intent to deliver.[29] There is "no case in Pennsylvania which announces a fixed line to distinguish between mere possession and possession with intent to de-

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21. *See* note 2 *supra*.
22. 234 Pa. Super. Ct. at 90, 339 A.2d at 107 (Hoffman, J., dissenting).
23. *Id.* at 89, 339 A.2d at 107. The officer checked the defendant's arms and veins for needle marks. He also checked the defendant's nostril area and noticed no inflamation and no burnt nostril hairs.
24. *Id.* at 90, 339 A.2d at 107 (Hoffman, J., dissenting). The defendant was never examined by a doctor to determine drug use as a medical fact.
25. *Id.* at 91 n.3, 339 A.2d at 108 n.3.
26. *Id.* at 91, 339 A.2d at 108. The dissent made the following additional remark: "The second factor, that the narcotic was the type usually sold to addicts, must be discounted entirely, for it is equally true that it would also be the type of narcotic bought and used by addicts to support a drug habit." *Id.* at 91, 339 A.2d at 108 (Hoffman, J., dissenting).
27. The defendant possessed twenty-five small glassine packets of heroin. The total weight of the heroin and quinine mixture at an average of 1.5 grains per bag was approximately two grams.
28. To support the inference the dissent felt that the following facts should be considered in addition to quantity:

> whether the defendant is a drug user; the possession of paraphernalia for drug distribution; the purity of the drug; the manner of its packaging; or other admissions and behavior of the accused indicative of trafficking in rather than simple use of narcotics . . . . These additional factors are absent in the instant case and the quantity alone does not support the inference of intent to deliver.

234 Pa. Super. Ct. 83, 92-93, 339 A.2d 103, 108-09 (Hoffman, J., dissenting) (citations omitted).
29. The confusion is less apparent in *Santiago*, in which the amount is considerable and the surrounding facts and circumstances unequivocally support the inference of intent.

liver."[30] The statute, absent specific quantity limits,[31] allows for evidentiary dispute. The controversy does not concern possession, which has been either proven or admitted; rather, confusion arises from the question of the *minimum* quantum of evidence required to permit the inference of intent. Without a more palpable litmus for evidencing intent to deliver, the case law merely echoes the same all-inclusive standard, regardless of manifold fact situations.[32]

Prior to *Harris*, the need for evidence of quantity was viewed as inversely proportionate to the amount of other evidence presented—as the quantity possessed increased, the need for additional facts and circumstances decreased.[33] Implicit in *Harris* is the logic that any measurable quantity that will suffice for proof of simple possession can support the inference of intent to deliver, given proof of certain other facts and circumstances.[34] The evidentiary standard is elastic; consequently, it is consistent with *Harris* to permit the inference of intent even though the defendant possessed *less* than the maximum amount carried by the "normal user" for personal use.[35]

This absence of specific statutory limits[36] to distinguish mere possession from possession with intent to deliver necessitates implementing a procedure to facilitate evaluation of the quantity possessed in relation to the other facts and circumstances. Expert opinion testimony was utilized to

30. Commonwealth v. Harris, — Pa. Super. Ct. —, —, 359 A.2d 407, 411-12 (1976) (Hoffman, J., dissenting).

31. Pennsylvania's legislation is an adoption of the Controlled Substances Act, 21 U.S.C. §§ 801 to 966 (1970), which was drafted to achieve a coordinated, codified uniformity between state and federal legislation and enforcement.

32. What is a "*sufficient* quantity?" What are "*proper* other facts and circumstances?" The trier of fact is unaided in the use of its discretion to measure the facts of each case against such broad standards. There appears to be no coordination given to the evidence of intent. *Compare*, *e.g.*, Commonwealth v. Wright, 234 Pa. Super. Ct. 83, 339 A.2d 103 (1975) (evidence that defendant was not an addict held, if undisputed, to be strong evidence of intent to deliver); *and* Commonwealth v. Felton, 67 Pa. D. & C.2d 541 (C.P. Phila. 1974) (possession of fifty bags of heroin insufficient to permit inference of intent to deliver); *with* Commonwealth v. Harris, — Pa. Super. Ct. —, 359 A.2d 407 (1976) (possession of sixteen "half-spoons" of heroin and testimony of expert pertaining to what the "normal user" ordinarily possesses sufficient to permit inference of intent to deliver; no evidence of drug use or non-use).

33. *See*, *e.g.*, Commonwealth v. Santiago, 462 Pa. 228, 340 A.2d 440 (1975); Commonwealth v. Hill, 236 Pa. Super. Ct. 572, 346 A.2d 314 (1975); Commonwealth v. Sterling, 64 Lanc. 385 (Pa. C.P. 1975); Commonwealth v. Arce, 25 Cumb. 62 (Pa. C.P. 1974); Commonwealth v. Santos, 24 Cumb. 123 (Pa. C.P. 1974); Commonwealth v. Jackson, 24 Cumb. 59 (Pa. C.P. 1973). In each of the foregoing decisions there is evidence either of an extremely large quantity of narcotics or of other facts and circumstances probative of intent to deliver. This, however, does not mean that there is a coordinated pattern to the *kinds* of facts presented in the cases. *See* note 32 *supra*.

34. "[T]he amount . . . is not necessarily crucial . . . if the proper other facts are present." — Pa. Super. Ct. — n.3, 359 A.2d 407, 408 n.3 (1976). The question remains open, therefore, whether possession may be found "when the amount of the drug involved is not a usable amount, but rather is only a minute quantity or chemical trace." No case on point has been decided by Pennsylvania appellate courts. Comment, *Possession and Control of Drugs in Pennsylvania: What Is It?*, 10 DUQ. L. REV. 476, 481 (1972).

35. Consider this hypothetical situation: the defendant is arrested for possession of a small quantity of heroin. If the defendant is not a user, the inference of intent will be permitted because it is more likely than not that the defendant intends to deliver the substance. The result would be the same if the defendant is observed attempting to deliver a small amount of heroin to another, but is arrested prior to delivery. *See also* note 34 *supra*.

36. *See* 35 PA. CONS. STAT. ANN. § 780-113 (a)(30) (Purdon Supp. 1976).

evaluate the quantity possessed by Harris.[37] The expert in *Harris* considered the amount of heroin in defendant's possession at the time of the arrest to exceed the amount carried by the "normal user" for personal use.[38] *Harris* is significant because no additional evidence was considered.[39] The opinion testimony alone was controlling and performed a dual function—it was used by the prosecution to clarify the quantity, and it was substituted for proof of additional facts and circumstances. This distinguishing aspect of *Harris* is recorded innocuously in a footnote to the text of the opinion: "In the case at bar, the detective's expert testimony supplied sufficient other facts to support the inference."[40] It is in this dual use of the expert opinion testimony, coupled with the absence of additional facts and circumstances, that *Harris* extended *Commonwealth v. Hill* [41] and *Commonwealth v. Wright*[42] and drastically lowered the quantity of evidence necessary to support the inference of intent to deliver.

Traditionally, expert testimony is employed when it provides the sole means of obtaining accurate information about a particular subject, or when the subject is one transcending the common knowledge and experience of the lay juror.[43] In cases like *Harris* expert opinion testimony is necessary to interpret the quantity of narcotics because it is reasonable to assume that few jurors are versed in the manner and mode of narcotics transactions. This does not, however, diminish the prosecution's burden of proving every element of an offense beyond a reasonable doubt.[44] Opinion testimony is generally considered the "lowest grade of evidence"[45] and is "permissible only because, bad as it is, there is nothing better attain-

37. Bald proof of possession of a certain amount, especially when the amount is equivocal, does not permit the inference of intent to deliver. Since the term "sufficient quantity" requires definition, testimony from a narcotics expert is needed. Evidence of quantity, unless the quantity is extremely large, is meaningful only in the context of contemporary drug usage, custom, and practice. Nevertheless, the expert opinion concerning the amount, when the amount is equivocal, should not be permitted to constitute *all* the evidence of intent to deliver. Other evidence should be required, because "[i]t is at least as likely that [the defendant] possessed the drugs for his personal use." Commonwealth v. Harris, — Pa. Super. Ct. —, —, 359 A.2d 407, 412 (1976) (Hoffman, J., dissenting).

38. — Pa. Super. Ct. at —, 359 A.2d at 410. The detective in *Harris* arrived at his conception of the "normal user" empirically, utilizing "reasonable probabilities." The detective considered the following indicia: the number of arrests of users in the years preceding the *Harris* arrest (over fifty arrests); the approximate total number of arrests of users in his nine years on the force; the number of arrests of people in the last year who were subsequently convicted of possession with intent to deliver a controlled substance (several dozen); and the number of arrests of people in his nine years on the force who were subsequently convicted of possession or possession with intent to deliver (hundreds). *Id.* at —, 259 A.2d at 408-10. Use of such testimony may be the only means of obtaining information about narcotics transactions. *See* note 46 and accompanying text *infra*.

39. "Thus, appellant stands convicted of possession with attempt to deliver on the . . . officer's speculation concerning what the normal drug addict's daily usage is and on the fact that he possessed sixteen 'half-spoons' of heroin." — Pa. Super. Ct. —, —, 359 A.2d 407, 412 (Hoffman, J., dissenting).

40. — Pa. Super. Ct. —, — n.3, 359 A.2d 407, 408 n.3.

41. 236 Pa. Super. Ct. 572, 346 A.2d 314 (1975). *See* note 6 *supra*.

42. 234 Pa. Super. Ct. 83, 339 A.2d 103 (1975). *See* notes 19-28 and accompanying text *supra*.

43. MCCORMICK ON EVIDENCE § 13, at 29-31. (2d ed. E. Cleary 1972). *See* FED. R. EVID. 702. *See generally* Hand, *Historical and Practical Considerations Concerning Expert Testimony*, 15 HARV. L. REV. 40 (1901).

44. Commonwealth v. MacNeil, 461 Pa. 709, 337 A.2d 840 (1975).

45. Dawson v. Pittsburgh, 159 Pa. 317, 325, 28 A. 171, 173 (1893).

able."[46] Unbridled use of expert testimony threatens the right of the accused to a fair trial by jury.[47]

In *Commonwealth v. Heller* the court declared that "an opinion is only an opinion. It creates no fact."[48] Nevertheless, the *Harris* court permitted the expert's testimony to supply "sufficient other *facts*,"[49] notwithstanding ample access to circumstantial evidence enjoyed by the prosecution. The weakness of *Harris*, the dissent indicates,[50] is that the expert testimony did not supply "other facts." The inferred fact was intent to deliver; the opinion testimony was a deduction born of one officer's limited past experience—his abstraction of what the "normal user" ordinarily carried for personal use.[51]

Viewed in this light, *Harris* confirms the need for a procedural safeguard against abuse of the evidentiary process in prosecutions for possession with intent to deliver. More empirical criteria should be employed to avoid the uncertainty inherent in the present elastic standard of sufficient quantity based on facts and circumstances.[52] The dissents in *Wright*[53] and *Harris*[54] articulate these evidentiary criteria.[55]

One workable method of avoiding this uncertainty would be the adoption of a pattern jury instruction incorporating these criteria.[56] In the

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46. *Id.* at 325, 28 A. at 173.

47. The reason was sometimes given that such testimony usurps the function or invades the province of the jury. Obviously, these expressions were not intended to be taken literally, but merely to suggest the danger that the jury might forego independent analysis of the facts and bow too readily to the opinion of an expert . . . .

McCORMICK ON EVIDENCE § 12, at 27 (E. Cleary 2d ed. 1972) (citations omitted).

48. 369 Pa. 457, 461, 87 A.2d 287, 289 (1952).

49. — Pa. Super. Ct. — at n.3, 359 A.2d at 408 n.3 (emphasis added).

50. *Id.* at —, 359 A.2d at 412 (Hoffman, J., dissenting).

51. *See* note 38 *supra*.

52. Commonwealth v. Santiago, 462 Pa. 216, 225, 340 A.2d 440, 444 (1975).

53. *See* note 28 *supra*.

54. — Pa. Super. Ct. at —, 359 A.2d at 411 (proof of the purity of the drug or proof of addiction or non-addiction).

55. A contemporary author has recommended a checklist of factors to be used by the arresting officer to preserve evidence of possession with intent to deliver. K. JARVIS, PENNSYLVANIA CRIMES CODE AND CRIMINAL LAW § B3, at 78 (Supp. 1975).

56. This could be accomplished via the rulemaking power of the Pennsylvania Supreme Court under PA. CONST. art. V, § 10(c), which states: "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . ."

The criteria that coordinate the evidence can be distilled from common, empirical indicia of the delivery of narcotics. *See* notes 53-55 and accompanying text *supra*. Such evidentiary criteria have been included in a recently-drafted pattern jury instruction suggested for use in Pennsylvania courts:

> In determining whether it has been proven that the defendant had the intent to deliver the substance (and not merely the intent to retain it for his personal use) you should consider all the evidence including the evidence as to (the quantity and value of the substance) (whether the defendant was an addict or user and, if so, whether the amount exceeded what he might be expected to have on hand for his own use) (the manner in which the substance was packaged) (whether the substance was ready for use or could not be used unless cut or diluted) (whether there was paraphernalia for cutting, weighing or packaging the substance) (whether the defendant solicited, or negotiated with, potential buyers of the substance) (whether the defendant on other occasions sold or otherwise delivered controlled substances).

A. MURPHY, CIRCUMSTANTIAL EVIDENCE OF INTENT TO DELIVER OR MANUFACTURE; CRIM. INST. SUBCOMM. OF THE PA. SUP. CT'S COMM. ON STANDARD JURY INST. (Reporter's Draft, Aug. 25, 1976).

case of possession with intent to deliver, such an instruction would impose order and consistency on the production of evidence. It would endow the requirement of sufficient evidence with meaning.[57]

Although a pattern jury instruction may not prove to be the panacea[58] for the many problems attendant to proof of intent to deliver, use of the instruction would gird the trier of fact with an empirical standard against which to test the evidence; it would motivate the prosecution to present all the evidence of intent to deliver; and it would have a desirable correlative effect in the accretion of a coherent body of case law. Finally, use of the pattern jury instruction would help ensure for the defendant a fair trial in which every element of the offense is proven beyond a reasonable doubt.

Harris demonstrates the current minimum quantity of evidence necessary to permit the inference of intent to deliver a controlled substance. A defendant can be convicted of possession with intent to deliver based on proof of possession and the expert opinion testimony of a police officer that the defendant possessed more than the normal user requires for personal use. The case represents an extension of prior case law to the extent that this expert testimony was permitted to perform two functions—it was used to evaluate the quantity, and it was used as a substitute for "other facts and circumstances." Although *Harris* remains the current standard of proof for intent to deliver heroin in Pennsylvania, it exemplifies the confusion regarding the standard of proof in similar cases that is certain to endure in the absence of more concrete evidentiary criteria for circumstantial evidence of possession with intent to deliver.

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57. "The reasons given for adoption of pattern jury intructions vary from state to state, and in order of importance; but generally there are five: accuracy, time savings, impartiality, intelligibility, uniformity." Note, *Pattern Jury Instructions*, 40 N. DAK. L. REV. 164, 165 (1964).

Criminal instructions can be made more categorical because of the greater dependence on the statutory definition of the crime. In this sense, pattern jury insructions would eliminate many reversals and appeals generated by inaccurate paraphrasing of the controlling statute.

The use of patterned jury insructions is advocated in R. MCBRIDE, THE ART OF INSTRUCTING THE JURY §§ 9.06-.14 (Supp. 1973).

> A collection of accurate, impartial, and understandable pattern jury instructions should be available for use in criminal cases in each jurisdiction. Counsel and the court should nonetheless remain responsible for ensuring that the jury is adequately instructed as dictated by the needs of the individual case, and to that end should modify and supplement the pattern instructions whenever necessary.

ABA STANDARDS RELATING TO TRIAL BY JURY § 4.6(a) (Approved Draft, 1968).

58. *See* R. MCBRIDE, THE ART OF INSTRUCTING THE JURY 9.06 (Supp. 1973); *cf.* Winslow, *The Instruction Ritual*, 13 HAST. L.J. 456 (1962).

[Casenote by Lawrence T. Bowman.]